United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-1019

IN THE

United States Court of Appeals

For the Second Circuit

No. 75—1019

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

BERTRAM L. PODELL and MARTIN MILLER,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT BERTRAM L. PODELL'S BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES (CONT'D.)

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BRIEF FOR APPELLANT BERTRAM L. PODELL

Preliminary Statement

The Appellant, Bertram L. Podell, appeals from an Order entered in the United States District Court for the Southern District of New York (Carter, J.) denying his Motion for the withdrawal of his guilty plea pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure.

On his plea of guilty, Podell was convicted of violating the Federal Conflict of Interest statute, Title 18, United States Code, Section 203 and conspiracy to violate that statute in violation of Title 18, United States Code, Section 371. After denial of his Motion, Appellant was sentenced to two years imprisonment with the execution of all but six months suspended (count one) and fined in the amount of $5,000 (count two). (T 141)*

The Indictment appears on page 15 of the Appellants' Joint Appendix.

STATEMENT OF THE FACTS

THE INDICTMENT

Bertram L. Podell, while a Member of Congress serving Brooklyn's Thirteenth Congressional District, was charged in a multi-count Indictment which alleged that he and others conspired to commit and did in fact commit bribery, conflict of interests and perjury.[1/] (Footnote on next page).

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*The letter "A" refers to the Appellants' Joint Appendix, while the letter "T" introduces reference to the transcript of the proceedings below.

The charges in the Indictment arose out of Podell's appearance before various Federal agencies on behalf of Florida-Atlantic Airlines, a now defunct corporation, while a Member of the House of Representatives. The theory of the Government's case was that Podell was compensated for these appearances by fees paid to the Appellant's law firm and campaign contributions.[2/]

THE GUILTY PLEA

After nine days of trial and while on the defense case, Podell withdrew his previously entered plea of not guilty and entered a plea of guilty to the conflict of interest count (count five) and to the charge of conspiracy to commit a conflict of interest (count one).[3/]

1/ Also named as defendants in the Indictment were Herbert S. Podell, the Appellant's brother who was severed prior to trial and Martin Miller who is similarly prosecuting an appeal in this Court.

2/ This is the second time that this Court has been called upon to review an Order of the District Court in this case. See, United States v. Carter, 493 F.2d 704 (2nd Cir., 1974).

3/ It was made clear at the time of the allocution that under count one, the Appellant pleaded guilty only to conspiracy to violate Title 18, United States Code, Section 203. At the time of the plea, the prosecutor stated that: "The government also understands that the defendant is not in any way admitting to the bribery objects of the conspiracy." (A 45)

THE MOTION TO WITHDRAW THE PLEA

Prior to sentence, the Appellant moved pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure for an Order allowing him to withdraw his plea of guilty. (A 56) This Motion was grounded upon an allegation that certain essential promises made by the Government during plea negotiations had been breached when, on the eve of sentence, a Government attorney wrote to the sentencing Judge and, in effect, recommended that Podell be sentenced to jail.[4/]

On the Motion, Appellant alleged that this letter flew in the face of a categorical promise by the Government attorneys that they would:

> "...not recommend imprisonment, and further would take absolutely no position at the time of sentence." (A 60)

In the Court below, the Government first asserted, rather plaintively, that the Mukasey letter was not a recommendation that Podell be sentenced to jail. (A 78 - 79) The Trial Court dismissed this argument out of hand and stated that:

[4/] This letter, signed by Assistant United States Attorney Michael B. Mukasey, appears in Appellants' Joint Appendix at p.53.

> "I think the letter is a recommendation for a jail sentence and I think if you did make such a promise, the question is whether or not not only that you violated it, but what effect that had." (A 79)

Furthermore, the Court's attention was drawn to an agreement that one of the Government attorneys would testify on Podell's behalf at any disciplinary proceeding conducted by the Bar Association.[5/] Albeit it unusual, the purpose of this testimony,

> "...would be to demonstrate to the Referee that there was no bribery involved in this case and, further, that the offenses of which the defendant was convicted did not reflect a corrupt and criminal intent." (A 60)

It was clear that the Mukasey letter pragmatically precluded Podell from calling one of the Government attorneys to testify at such a proceeding. (A 61)

On the basis of this Motion, the Court directed that an evidentiary hearing be held. (A 71) The Court viewed the issue as,

> "...a question of fact whether or not certain promises were made....that were violated[.]" (A 69)

5/ Podell was admitted to the New York Bar in 1950.

At the evidentiary hearing, the Trial Court heard testimony of the Appellants Podell and Miller and each of the attorneys who participated in the trial. Podell testified that he was told by Assistant United States Attorney Rudolph Guiliani that the Government would not take a position with regard to the imposition of a jail sentence and that Guiliani told the defendant-witness that "no one wants to see you go to jail." (A 82) Moreover, Podell recalled that Guiliani told him that he would appear at a Bar Association hearing and would there testify that "there was no bribery involved." (A 83) Such testimony, Podell was told, would save his license to practice law as the crimes to which he pleaded constituted misdemeanors under state law for which he was not subject to automatic disbarment. (A 83) The fact that Podell's plea was entered in an attempt to retain his law practice is undisputed. (A 83, 100) In fact, this conclusion was reached by the Trial Court. (A 181) The Court stated that:

> "In pleading to the conflict of interest count, he at least has a fighting chance to maintain his license to practice law and I am convinced that that is the reason for his plea, the reason he aborted the trial." (A 181)

Although the chief Government counsel flatly denied that

he told Appellant's counsel that he would not recommend a jail sentence in this case (A 101 - 102), there was strong evidence to the contrary. In addition to Podell's testimony, two lawyers representing Appellant testified that they had been told that the Government would make no recommendation that Podell be sentenced to jail. (A 121, 144) Additionally, both attorneys stressed the importance of Mr. Guiliani's proposed appearance at a Bar Association disciplinary proceeding. (A 123, 145) According to both attorneys, Podell relied upon these promises in determining whether to change his plea. (A 122 - 124, 147, 152)

Despite this sharp conflict in testimony, cross-examination of another Government attorney provided an adequate basis for a finding that, indeed, a promise had been made that the Government would not recommend a jail sentence be imposed. (A 163 - 164)

After testimony had been taken, the Court made a finding of fact that the Government had made a representation and that the letter was "in essence...a violation of the spirit, if not the letter of the agreement." (A 180) The Court concluded, however, that the Government's representation did not "play a material or significant part in the defendant's plea." (A 180 - 181)

STATUTES INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure states as follows:

> "(d) Withdrawal of Plea of Guilty. A Motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Rule 11 of the Federal Rules of Criminal Procedure states as follows:

> "PLEAS A defendant may plead not guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. As amended Feb.28, 1966, eff. July 1, 1966."

QUESTIONS PRESENTED

1. Whether the Government's failure to fulfill its promise not to recommend a prison sentence required that Appellant's Motion to withdraw his plea be granted?

2. Whether the Trial Court failed to comply with Rule 11 of the Federal Rules of Criminal Procedure prior to accepting the plea of guilty?

3. Whether the Court was given a factual basis for the plea of guilty to the conspiracy count at the time of that plea?

POINT I

THE GOVERNMENT'S FAILURE TO ADHERE TO ITS PROMISE THAT THERE WOULD BE NO RECOMMENDATION OF A PRISON SENTENCE REQUIRES THAT PODELL BE ALLOWED TO PLEAD ANEW TO THE COUNTS IN ISSUE.

It has now become an elementary principle of criminal law that:

> "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971).

In the case at bar, the District Judge made a finding of fact that a promise to abstain from a recommendation on sentence was made and then that agreement was breached.[6/] More specifically, the Trial Court articulated its finding as follows:

> "THE COURT: I think I have announced already my position on the letter, the government's letter of January 2nd, court's exhibit 1, is a recommendation that prison term be imposed. Otherwise, the letter makes no sense at all to me.
>
> The government does not recommend a specific prison term and argues this letter does not violate a representation. While that may be technically correct, I view the letter in essence as a violation of the spirit, if not the letter of the agreement." (A 180)

In denying Appellant's Motion, however, the Court concluded that the representations or promises made by the prosecutor were not a material or significant part of the plea. In this regard, the Trial Court stated that:

[6/] The Mukasey letter cannot be characterized as a negligent or inadvertent breach of the promise. After denial of Appellant's Motion and prior to the imposition of sentence, another Government attorney brazenly excoriated Podell and further advanced the theme previously set forth in the letter. (A 191 - 199)

"However, I am not persuaded the representation played a material or significant part in the plea of either Mr. Miller or Mr. Podell. I am persuaded that the reason Mr. Podell pleaded guilty to the conflict of interest count, was principally and primarily and ex-exclusively because he was concerned that the jury might find him guilty of the bribery count and that he would automatically be disbarred.

In pleading to the conflict of interest count, he at least has a fighting chance to maintain his license to practice law and I am convinced that that is the reason for his plea, the reason he aborted the trial.

* * * *

Therefore, the motion to withdraw the plea is denied." (A 180 - 181)

The issue for this Court is clearly framed. Did the Trial Court err in its conclusion that the representations made by the Government attorneys were not part of the inducement or consideration in the taking of the plea? Appellant, Podell, submits to this Court that the District Court's conclusion has no basis in the record and, in fact, is inconsistent with uncontradicted testimony presented at the evidentiary hearing.

First, it should be clear that there was never any dispute below nor is there on appeal that the compelling motivation underlying the guilty plea was Podell's attempt to retain

his license to engage in the practice of law. (A 74)[7/] This premise, however, certainly does not exclude a finding that the question of imprisonment was a significant aspect in the Appellant's decision to plead guilty. Moreover, this same premise, that the plea was entered to avoid disbarment, supports Podell's contention that Mr. Guiliani's agreement to testify at a disciplinary proceeding was a critically important part of the plea.

It is first submitted that the very nature of these promises or agreements clearly illustrates their importance in the plea-bargaining process. It is difficult to imagine that in any criminal case, a defendant could be totally indifferent to the question of whether he would be incarcerated. It should be sufficient to point out that Podell and his attorneys actively solicited the Government's representation that they would not recommend imprisonment. To then argue that this promise was not part of Podell's consideration of

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[7/] It was apparently the understanding of all parties that the crimes to which Podell pleaded guilty, although felonies under Federal law, were misdemeanors under New York State law and, therefore, did not subject the defendant to automatic disbarment.

his plea is disingenuous.

Santobello v. New York, supra. involved a strikingly similar fact pattern. As in the instant case, a prosecutor in Santobello made an off-the-record promise to defense counsel that there would be no sentence recommendation by the prosecution. At the time of sentence, however, a second prosecutor made a strong plea for a jail sentence. Also significantly relevant is the fact that the Petitioner in Santobello had other objectives in mind when he "bargained" for the plea. He was seeking, as the Supreme Court found, to secure dismissal of more serious charges. That is exactly, as the record at bar discloses, what Podell was seeking. But as in Santobello, there was also the condition that no sentence recommendation would be made by the prosecutor.

The Court there stated:

> "It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial." 404 U.S. at p.264. (Emphasis added)

With regard to the Government's promise concerning the prospective testimony of Mr. Guiliani at a disciplinary proceeding, it is utterly impossible to minimize the relative

significance of this agreement in the plea-bargaining process. At the very least, Guiliani was prepared to testify, according to his own testimony at the evidentiary hearing, that there was no bribery involved in this conviction. Mr. Guiliani stated under oath that he had told Podell directly that:

> "We would testify that Mr. Podell pleaded guilty to conspiracy to defraud, conflict of interest; he had not pleaded guilty to bribery and as far as the United States attorneys were concerned that satisfied the crimes he had committed in this case or something.
>
> That might not be the exact words but it was something like that." (A 104 - 105)

In fact, there was really very little difference between this testimony and Podell's which was,

> "...he said, 'I will testify for you at the Bar Association hearing, I will be your witness at the Bar Association hearing, I will testify that there was no bribery involved,' and he used the following words, that this was an unwillful conflict of technical conflict of interest and nothing more and 'that will save your license.' " (A 83)

The fact remained that Guiliani had agreed to testify before the Bar Association proceeding on Podell's behalf. To be sure, the value of such testimony by one's adversary in a criminal proceeding is inestimable. The Mukasey letter, however, which

is totally antagonistic to a finding that Podell should pass muster in any examination of his character, pragmatically foreclosed Appellant's ability to call Guiliani as a witness. Guiliani can now hardly testify in any way favorable to Podell without being impeached by the letter of his co-counsel stating the "government's position."

Yet another fact which would preclude a finding that Podell did not rely on this agreement is Guiliani's own testimony that he was asked by Podell's counsel to personally speak to Podell and make this assurance. Mr. Guiliani testified that:

> "You [La Rossa] asked me if I would come into the witness room with you, the first witness room Mr. Podell was in, and tell that to Mr. Podell. And I said I didn't want to do that. And you said, it would be helpful if I did so. I went in the witness room, the first witness room we were in - that's the first time I talked to Mr. Podell that afternoon - and you said tell him what you said. And I said, 'If called to testify at the Bar Association, we would testify.' Mr. Jaffe was with me." (A 104)

If there be any doubt as to reliance after a review of the promises themselves in the context of the Santobello decision, Appellant's argument receives additional support from the uncontradicted testimony of his attorneys. Mr. La Rossa

testified as follows:

> "Q. Is there any question in your mind as you sit here now that these two promises were made by Mr. Guiliani?
>
> A. Absolutely no question.
>
> Q. Is there any question in your mind as you sit here now that Mr. Podell relied on these promises on entering his plea of guilty?
>
> A. He did." (A 124)

Mr. Shargel described the defense as "primarily concerned" as to whether "jail time would be recommen ed." (A 147) On cross-examination, Mr. Shargel testified that:

> "Mr. Podell as far as I was concerned, individually, had two objectives in pleading guilty.
>
> The first was to retain status as a lawyer.
>
> The second was not to go to jail.
>
> So, in terms of relative importance, I would place a great deal of emphasis on those two aspects." (A 152)

The above submitted facts clearly belie, therefore, any assertion that these promises were insignificant in Podell's consideration of whether to enter a plea of guilty.

Circuit Court cases which followed Santobello lend further

support to Appellant's position. In United States v. Brown, 500 F.2d 375 (4th Cir., 1974), it was demonstrated that Courts will not minimize the crucial role of a prosecutor's recommendation at the time of sentence. It is almost inconceivable that such recommendation could be considered as playing only a minor part in plea-negotiations. As explained by the First Circuit Court of Appeals in Correale v. United States, 479 F.2d 944, 949 (1st Cir., 1973):

> "The reason [for granting defendant relief where promise is broken] is obvious; it is the defendant's rights which are being violated when the plea agreement is broken or meaningless. It is his waiver which must be voluntary and knowing. He offers that waiver not in exchange for the actual sentence or impact on the judge, but for the prosecutor's statements in court. If they are not adequate, the waiver is ineffective."

Here, Podell's waiver was offered in exchange for the Government's promise that it would not recommend a jail term and further, Guiliani's agreement that he would testify at a disciplinary hearing. The Government's failure to adhere to these agreements has rendered Podell's waiver ineffective. See, also, United States v. Ewing, 480 F.2d 1141 (5th Cir., 1973).

One case decided in this Circuit prior to the Santobello

decision will undoubtedly be relied upon by the Government, but it is easily distinguishable. In United States v. Lombardozzi, 436 F.2d 878 (2nd Cir., 1971), this Court held that promises made by Government agents concerning sentence did not deprive Lombardozzi's plea of its free and voluntary character. As stated, this decision was prior to the Santobello decision and moreover, this Court's conclusion was reached upon a finding that, in effect, the defendant Lombardozzi got what he bargained for. It was there stated that:

> "The judge made it entirely clear that he would make no recommendation to the attorney general and that whether the sentences would be concurrent will be left wholly to the discretion of the attorney general."

It was earlier stated that:

> "Appellant expressed himself as satisfied with this disposition."

In a subsequent proceeding, United States v. Lombardozzi, 467 F.2d 160 (2nd Cir., 1972), this Court stated that the same defendant Lombardozzi did not receive a "Santobello promise, one that 'can be said to be part of the inducement or consideration,' ". It was there stated that:

> "Appellant received, in short, all that he bargained for when he received a sentence under Section 4208(a)(2) to the custody of the attorney general."

In the instant case, there can be no question but that the Appellant, Podell, received none of what he bargained for.[8/]

One question remains. That is, what relief is the Appellant entitled to on the basis of the Government's breach of promise? It would seem on the facts of this case that withdrawal of the plea is the only reasonable remedy. There is no way that specific performance would allow a Government attorney to testify at a Bar Association hearing. The Mukasey letter cannot be made to disappear. See, United States ex Rel Culbreath v. Rundle, 466 F.2d 730 (3rd Cir., 1972).

[8/] In the first Lombardozzi case, 436 F.2d at p.881, this Court stated that: "It is entirely proper for the court to consider the prejudice to the government which would result from granting the motion." Although in this case prejudice to the Government was not considered by the Court in the denial of the Motion, such prejudice can hardly be argued here. At the time of the plea, when the defense case was near conclusion, the case had been on trial for only nine trial days.

POINT II

THE TRIAL COURT FAILED TO SUFFICIENTLY DETERMINE WHETHER THE APPELLANT UNDERSTOOD THE NATURE OF THE CONSPIRACY CHARGE TO WHICH HE PLEADED; UNDER THE AUTHORITY OF MC CARTHY V. UNITED STATES, THE APPELLANT SHOULD BE AFFORDED THE OPPORTUNITY TO PLEAD ANEW TO THAT CHARGE.

On appeal, the Appellant, Bertram L. Podell, contends that he should be afforded the opportunity to plead anew to the conspiracy count on the ground that the Trial Court accepted the plea in violation of Rule 11 of the Federal Rules of Criminal Procedure. Mc Carthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969). Although this issue was not raised in the Court below, it is submitted that a claim of this nature can be brought for the first time on direct appeal. United States v. Untiedt, 479 F.2d 1265 (8th Cir., 19[illegible]). This would seem especially true where the Rule 11 attack is coupled, as here, with an allegation that the Appellant's factual admissions did not constitute a violation of the statute involved.[9/]

9/ It should be emphasized that this claim is only with regard to the Appellant's plea to the conspiracy charge, as modified, under count one of the Indictment.

See, United States v. D'Amato, --- F.2d --- (2nd Cir., December 5th, 1974) sl.op. p.575.

In the afternoon of the ninth day of trial, the Appellant, Podell, offered to conclude the trial by pleading guilty to the conflict of interest count, count five, and the conspiracy count, count one, as modified. (A 41) The stated objective of modifying the conspiracy charge was to afford the Appellant an opportunity to plead only to an agreement to violate the conflict of interest of statute. Title 18, United States Code, Section 203. The attorney for the Government stated that:

> "It is the government's position that the plea to the conspiracy count admits that the object of this conspiracy was to violate the conflict of interest law and thereby to defraud the United States.
>
> The government also understands that the defendant is not in any way admitting the bribery objects of the conspiracy. He is admitting the conflict of interest and the defrauding to the extent that it is meant by 'conflict of interest.' " (A 44 - 45)

The record discloses, however, a wholly insufficient understanding as to the essential elements of the modified conspiracy charge.

In relevant part, Rule 11 of the Federal Rules of Criminal

Procedure provides that the Court shall not accept a plea of guilty without a determination that:

> "The plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea."

The Rule further states that:

> "The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

In Mc Carthy v United States, supra., decided more than five years before the plea in this case, the Supreme Court held that Rule 11 must be strictly construed and that the Trial Judge must inquire into the defendant's understanding of the essential elements of the crimes charged. Only then can the Judge properly determine:

> "...that the conduct which the defendant admits constitutes the offense charged in the indictment...to which the defendant has pleaded guilty." 394 U.S. at p.467.

As this Court has recently stated, the Trial Court must at least set out the bare bones elements of the offense charged. Irizarry v. United States, --- F.2d --- (2nd Cir., December 19th, 1974) amended opinion, January 23rd, 1975., sl.op p.899. Explanation of the essential elements of the conspiracy charged was particularly appropriate because of the relatively

complex nature of the charge. Majko v. United States, 457 F.2d 790 (7th Cir., 1972).

The entire proceeding leading up to the acceptance of Podell's guilty plea, albeit relatively brief, must be here set forth:

"MR. LA ROSSA: May it please the court, on behalf of the defendant Bertram Podell, he hereby offers to plead guilty to certain portions of the first count of the indictment, namely the first full paragraph of page two, eliminating the Herbert Podell, eliminating Section 201 of Title 18, and eliminating the Department of State.

In addition to that paragraph, I am referring now to the means paragraph on page four of the indictment, the defendant's plea will cover 5(b), again eliminating the Department of State; five(c), eliminating the words 'directly and' and on the third line of that paragraph; eliminating the name of Herbert Podell throughout the paragraph - it appears in two instances - and the last full line of that section; paragraph 5(a) is to be eliminated as well.

In addition to that, the defendant offers to plead guilty to count five of the indictment, again eliminating the Department of State and Herbert Podell.

THE COURT: Is he mentioned there?

MR. GUILIANI: Page 10, Your Honor, the bottom.

May I make a statement for the government, Your Honor?

THE COURT: Yes.

Would you defer your statement for the government until after I ask the questions of Mr. Podell?

MR. GUILIANI: Fine. It makes no difference.

THE COURT: Mr. Podell, you have heard what Mr. La Rossa has said, and what I have to ascertain is what he has indicated you are pleading guilty to; are you, in fact, doing that?

DEFENDANT PODELL: Sir, I'm sorry?

THE COURT: I'm sorry too.

Mr. La Rossa, your counsel, has indicated that you are pleading guilty to certain counts of the indictment with certain deletions. I want to know whether that is, in fact, true, whether you are in fact doing that.

DEFENDANT PODELL: Yes, I am.

THE COURT: I suppose I don't have to go through the usual litany with you, but I do have to make sure on the record that your plea is being made freely and voluntarily. I'm going to ask you a few questions in that regard.

First, you are making this plea, you are changing your plea, after these few days of trial, voluntarily, of your own free will.

DEFENDANT PODELL: Yes.

THE COURT: There has been no coercion by the government and no promises by your counsel, is that correct?

DEFENDANT PODELL: That's correct.

THE COURT: You discussed the matter thoroughly, I gather, with Mr. La Rossa, and you are satisfied with the advice he has given you in regard to what your rights are; is that correct?

DEFENDANT PODELL: Yes, Your Honor.

THE COURT: You were on the witness stand earlier, so I am confident that you are fully aware of what was going on and what is going on at the present time. You are of sound mind and everything else, so that you know what is going on.
There is no problem about that?

DEFENDANT PODELL: Yes, Your Honor.

THE COURT: Nor do I have to go into the problem of what you are foregoing since you realize that in view of the fact that we are now aborting the trial you are foregoing your right to trial by making this plea.

I think that is sufficient.

What I would like to hear from you, tell me in your own words what it is you did in respect to the counts you are pleading guilty to so I can be satisfied that you are, in fact, guilty.

DEFENDANT PODELL: If the court pleases, while a Member of Congress and acting as a lawyer for Florida-Atlantic Airlines and paid by Leasing Consultants, Inc., I appeared before various federal agencies, including the CAB, the FAA, and advocated the interests of the said Florida-Atlantic Airlines.

I was indirectly compensated through my law firm for these appearances before the CAB and the FAA while a Member of Congress.

I did not at the time know that I was violating any law, but I intended to do what I did.

THE COURT: I will accept the plea.

MR. LA ROSSA: I think Mr. Guiliani's statement should be read in conjunction with your acceptance of the plea, Your Honor. It defines the limits." (A 41 - 44)

As previously noted, the Government attorney went on to state that the Appellant was pleading guilty to the conflict of interest count and conspiracy to violate that statute only. (A 44 - 45) From an analysis of this Court's decision in Irizarry, it was at least necessary for the Court to set out the three essential elements of the conspiracy charge. Podell's plea should not have been accepted unless he understood that

this charge involved an agreement to violate Section 203; knowledge of the existence of a conspiracy; and an intent to participate in the unlawful enterprise. Irizarry v. United States, supra., sl.op p. 913b. Such an understanding is nowhere reflected in this record. See, also, United States v. Steele, 413 F.2d 967 (2nd Cir., 1969).

In United States v. Thomas, 468 F.2d 422 (10th Cir., 1972), the defendant Chatman pleaded guilty to a conspiracy charge while, as here, the trial was in progress. In reversing the judgment and sentence against Chatman, the Court, upon an application of Mc Carthy, stated that:

> "Although Chatman stated that the plea was made voluntarily and without any threats or promises, no explanation was made to him concerning the nature of the conspiracy charge and there was no indication that Chatman was fully aware of what constituted a conspiracy."

The case at bar is no different. This record reflects the Trial Court's effort to determine whether Podell was pleading voluntarily. Moreover, counsel for both sides described the offense to which the defendant was pleading. However, nowhere does there appear any indication that Podell was aware of what constituted a conspiracy to violate Title 18, United States

Code, Section 203. Furthermore, the defect in the case at bar is magnified by the fact that during the allocution, Podell categorically denied that his conduct contained any specific criminal intent. As in Mc Carthy, the Appellant herein contends that the conspiracy charge requires "the very type of specific intent that he repeatedly disavowed." 394 U.S. at p.471.

In sum, the record herein does not show that the Court correctly stated to Podell or that Podell truly understood, the elements necessary to prove the conspiracy to violate the conflict of interest statute. With regard to this count, there was absolutely no indication that Podell possessed an understanding of the law in relation to the facts. United States v. Cantor, 469 F.2d 435 (3rd Cir., 1972).

POINT III

THE TRIAL COURT DID NOT OBTAIN NOR DID THE RECORD SHOW A FACTUAL BASIS FOR THE APPELLANT'S PLEA TO THE CONSPIRACY CHARGE.

Appellant's earlier claim that the Trial Court failed to satisfy Rule 11 is inextricably a part of a second contention that the record failed to demonstrate a factual basis underlying the conspiracy charge to which the Appellant pleaded.

As previously noted, Rule 11 requires that:

> "The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

In Mc Carthy v. United States, supra., the Supreme Court noted that:

> "Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea.* * * Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.' " 394 U.S. at p.467.

Here, it is submitted that not only, as earlier argued, did Podell not understand the nature of the charge, but further that the conduct which he admitted did not constitute a violation of the conspiracy statute.

It has long been the position of this Circuit that:

> "Where the crime charged is conspiracy, a conviction cannot be sustained unless the government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute."

United States v. Cangiano, 491 F.2d 906 (2nd Cir., 1974). The conduct admitted by Podell, during his allocution, simply does not meet that threshold of proof. At the expense of repetition, Podell stated that:

> "If the court pleases, while a Member of Congress and acting as a lawyer for Florida-Atlantic Airlines and paid by Leasing Consultants, Inc., I appeared before various federal agencies, including the CAB, the FAA, and advocated the interests of the said Florida-Atlantic Airlines.
>
> I was indirectly compensated through my law firm for these appearances before the CAB and the FAA while a Member of Congress.
>
> I did not at the time know that I was violating any law, but I intended to do what I did." (A 43 - 44)

Conspicuously absent is any indication that Podell had the specific intent to violate the Federal conflict of interest statute. Nor is there any evidence whatsoever of an agreement to engage in unlawful activity. Assuming arguendo, that the substantive conflict of interest statute requires only general intent, satisfied by Podell's concession that "I intended to do what I did," the conspiracy count requires the additional element of specific intent. In United States v. De Marco, 488 F.2d 828, 832 (2nd Cir., 1973), this Court stated that:

> "The distinction between the scienter component of the conspiracy and substantive charges arises from the notion that although an individual may commit some crimes unwittingly, he cannot conspire to commit a specific crime unless he is aware of all the elements of the crime."

Here Podell's confessed ignorance of the statute, while not a defense to the substantive count, precludes a finding that he had the requisite intent to conspire to violate that statute. This is not to say that one may not be guilty of conspiracy unless he has actual knowledge of the criminal statute. On the peculiar facts of this case, however, we are dealing with a substantive statute which has been held not to require a specific criminal intent - a conscious purpose of wrongdoing, or evil motive. United States v. Quinn, 141 F.Supp. 622, 627 (S.D.N.Y., 1956). On these facts, it would be inconceivable that an individual may be held liable for agreeing to accomplish an objective of which he had no knowledge. And, as stated, the allocution makes absolutely no reference to any such agreement.

Judge Learned Hand's classic "red light" example is particularly useful here. In United States v. Crimmins, 123 F.2d 271, 273 (2nd Cir., 1941), Judge Hand stated that:

> "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past."

While here Podell may have arguably run past the conflict of interest statute, there is nothing in this record to indicate that he conspired to do so. In Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314 (1959), it was stated that there need not be proof that "conspirators were aware of the criminality of their objective." But to be sure, an essential ingredient of the proof would have to be that Podell and Miller knew that there was some type of liability under the Federal law. As in Ingram, "without the knowledge, the intent cannot exist."

Finally, it should be noted that the Government may not now contend that the factual basis for the plea to the conspiracy count appears elsewhere in the record. It is clear that where there is a post-Mc Carthy plea, the factual basis must be placed on the record at the time of that plea. See, Manley v. United States, 432 F.2d 1241 (2nd Cir., 1970). Irizarry v. United States, supra.

POINT IV

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, THE APPELLANT BERTRAM L. PODELL RESPECTFULLY JOINS IN THE POINTS RAISED BY HIS CO-APPELLANT INSOFAR AS THEY ARE APPLICABLE TO HIM AND NOT INCONSISTENT WITH THE POINTS RAISED IN THIS BRIEF.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment and sentence against Appellant, Bertram L. Podell, should be reversed and the matter remanded to the District Court to allow him to plead anew.

Respectfully submitted,

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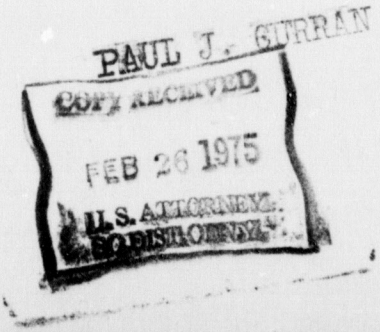
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